INDEX

	Page No.
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute and rule involved	2
Statement	3
Argument	8
Conclusion	12

CITATIONS

Cases:

Farnsworth v. *Zerbst*, 97 F. 2d 255	11
Farnsworth v. *Zerbst*, 98 F. 2d 541	11
Hirabayashi v. *United States*, 320 U. S. 81	9
Hood v. *United States*, 23 F. 2d 472, certiorari denied, 277 U. S. 588	8
Kirk v. *Squier*, 150 F. 2d 3, certiorari denied, 326 U. S. 775	11
Sims v. *Rives*, 84 F. 2d 871, certiorari denied, 298 U. S. 682	11
Sunal v. *Large*, 332 U. S. 174	12
Todorow v. *United States*, 173 F. 2d 439, certiorari denied, 337 U. S. 925	8
United States v. *Daugherty*, 269 U. S. 360	10
United States v. *Rice*, 192 Fed. 720	8

Statute and rule:

18 U.S.C. (1948 rev.) 401	2, 6
Federal Rules of Criminal Procedure, Rule 42(a)	3, 7, 9

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 255

GUS HALL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 256

HENRY WINSTON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 257

UNITED STATES OF AMERICA EX REL. GUS HALL, PETITIONER

v.

JAMES MULCAHY, UNITED STATES MARSHAL

No. 258

UNITED STATES OF AMERICA EX REL. HENRY WINSTON, PETITIONER

v.

JAMES MULCAHY, UNITED STATES MARSHAL

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals covering all four cases (No. 255, R. 202-213 [1]) has not yet been reported.

[1] The records in the criminal cases, Nos. 255 and 256, are identical and the records in the habeas corpus cases, Nos. 257 and 258, also are identical. The habeas corpus cases arose

JURISDICTION

The judgments of the Court of Appeals were entered July 14, 1949 (No. 255, R. 214; No. 257, R. 203). The petition for writs of certiorari was filed August 12, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

Petitioners do not contend that their misconduct did not constitute criminal contempt. The questions presented are:

1. Whether the trial judge had power to enter the judgments of conviction of contempt of court and the certificates required by Rule 42(a), F. R. Crim. P., on the third court day after the contempts were committed and the oral orders remanding petitioners to the custody of the marshal were made.

2. Whether the sentences to imprisonment for "the remainder of the trial in *United States* v. *William Z. Foster, et al.*, C 128-87" are so indefinite as to require resentencing.

STATUTE AND RULE INVOLVED

18 U. S. C. (1948 rev.) 401 provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

---

out of the criminal cases and involve the same facts. For convenience, we shall refer only to the records in Nos. 255 and 257.

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Rule 42(a), Federal Rules of Criminal Procedure, provides:

(a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

STATEMENT

Petitioners are two of eleven defendants presently on trial in the United States District Court for the Southern District of New York under an indictment which charges that they wilfully conspired (1) to organize a society which teaches and advocates the duty and necessity of overthrowing and destroying the Government of the United States by force and violence and (2) to teach and advocate the duty and necessity of overthrowing the Government of the United States by force and violence. On June 3, 1949, after the trial had been in progress for several months, the court, Judge Medina presiding, sentenced a co-defend-

ant, John Gates, to imprisonment for contempt committed by refusing to answer a question on cross-examination (No. 255, R. 18, 19). The following episode then occurred in the midst of the judicial proceedings, as shown by the record (No. 255, R. 19):

> (The defendants stand in the courtroom.)
>
> DEFENDANT WINSTON: If your Honor please, may I now be heard? More than 5,000 Negroes have been lynched in this country for such——
>
> THE COURT: Now, Mr. Winston——
>
> DEFENDANT WINSTON: ——and the Government of the United States should be ashamed for bringing in such monstrosity.
>
> THE COURT: Mr. Winston, I hereby direct that you be remanded for the remainder of the trial.
>
> DEFENDANT HALL: It sounds more like a kangaroo court than a court of the United States. I have heard more law and more law and more constitutional rights in kangaroo courts.
>
> THE COURT: Now let me see, this is Mr. Hall——
>
> DEFENDANT HALL: That is right, this is Mr. Hall.
>
> THE COURT: Mr. Hall, you are hereby remanded for the balance of the trial.

At this juncture, one of the defense counsel addressed the court and, in the course of his argument, the court suggested that "* * * it would be prudent if the defendants resumed their seats * * *" (No. 255, R. 19). Counsel disregarded

the court's suggestion, as did the defendants, who remained standing (No. 255, R. 19-20). The defendants remained standing in the court room while three of the defense counsel made arguments to the court (No. 255, R. 19-21). Then the defendant Dennis, who appears *pro se,* addressed the court. After some colloquy with the court, he stated to his co-defendants (No. 255, R. 21):

> Well, first I would like to urge upon my co-defendants that they at this time do not speak—they can act as they see fit. I urge them not to call for any provocation.

Only then did the defendants take their seats (No. 255, R. 21).

In accordance with the court's oral orders made in the course of the disturbance (*supra,* p. 4), petitioners were placed in the custody of the marshal.[2]

On June 6, 1949, petitioners filed identical petitions for writs of habeas corpus alleging generally that the oral orders of June 3, 1949, were illegal (No. 257, R. 52-54). Writs were issued the same day (No. 257, R. 55), and a hearing was had on the following day, Judge Leibell presiding. The marshal filed identical returns at that time, stating that he had petitioners in his custody pursuant to Judge Medina's orders of June 3, 1949 (No. 257, R. 56).

---

[2] The oral directions were reduced to writing in the form of "remand" orders (No. 255, R. 51).

On June 8, 1949, Judge Leibell summoned counsel to the court room and stated that the record of the proceedings before Judge Medina was not clear to him and that he did not understand whether the orders of June 3, 1949, remanding petitioners to the marshal's custody, were intended as punishment for contempt or as revocation of bail. He requested that a clarifying question which he formulated be presented to Judge Medina out of the presence of the jury, and that Judge Medina answer the question on the record. (No. 257, R. 109-113.) The question was (No. 257, R. 110):

> Was the remanding of the defendants Hall and Winston on June 3, 1949, intended as a form of punishment for any misbehavior on their part in the presence of the Court, constituting a contempt of court under Title 18, United States Code, Section 401(a)?

The question was immediately presented to Judge Medina and he promptly made the following reply (No. 255, R. 114):

> My answer is that the remanding of the defendants Hall and Winston on June 3, 1949, was intended, first, as an exercise of my plenary powers to remand the defendants, or any of them, at any time, and as a form of punishment for misbehavior on their part in the presence of the Court, constituting a contempt of Court under Title 18 U. S. C., Section 401(a).[3]

---

[3] It is clear that both Judge Leibell and Judge Medina intended to refer to Title 18 U.S.C., Section 401 (*1*), *supra*, p. 2. (No. 255, R. 115.)

On the same day, June 8, 1949, Judge Medina entered a judgment and certificate as to each petitioner, as required by Rule 42(a), F. R. Crim. P. (No. 255, R. 116-118). Each judgment states that on June 3, 1949, the defendant was "found guilty of contempt of court through actively participating in a disturbance in the courtroom in the course of the judicial proceedings, as set forth in the attached certificate." Each certificate recites that the contempt was committed in the presence of the court; that a week earlier, when the co-defendant Davis spoke out in the courtroom in the course of the judicial proceedings, the court warned all the defendants that sanctions would be imposed if they persisted in their tactics of disrupting the proceedings; that in the course of the disturbance on June 3, 1949, the two petitioners stepped past the end of the counsel table and toward the bench in a disorderly and threatening manner and shouted at the court in loud, angry voices; and that the situation was so serious that it became necessary to send for additional deputy marshals to assist in restoring order and to prevent further incidents in the courtroom.

On the following day, June 9, 1949, before Judge Medina, petitioners moved to set aside the judgments. The motions were denied. (No. 255, R. 122-131.)

Copies of the judgments and certificates were brought to the attention of Judge Leibell, and on June 9, 1949, he filed an opinion dismissing the writs of habeas corpus (No. 257, R. 121-130).

Judge Leibell held that petitioners were in custody pursuant to judgments of a court which had jurisdiction, and that the appropriate remedy to challenge the validity of the judgments was by appeal, not collateral attack.

On appeals to the Court of Appeals for the Second Circuit, the court held that the habeas corpus court properly dismissed the writs because the remedy of appeal was available to petitioners. The court also affirmed the contempt judgments as proper. (No. 255, R. 202-213.)

ARGUMENT

1. Petitioners were remanded to the custody of the marshal on June 3, 1949, because they committed contempts in the presence of the court in the course of judicial proceedings. They argue (Pet. 6-7) that in effect this was a revocation of their bail, and that the trial judge lacked power to take such action. As the Court of Appeals said (No. 255, R. 212-213), there is no occasion to consider the question whether bail may be revoked prior to conviction under circumstances such as occurred here.[4] For assuming, *arguendo,* that the court had no such power, the court did have power to punish petitioners for contempt and they are

[4] On the trial court's power to remand a defendant during the trial, see *United States* v. *Rice,* 192 Fed. 720, 721 (C.C.S.D. N.Y.); *Hood* v. *United States,* 23 F. 2d 472, 475 (C.A. 8), certiorari denied, 277 U. S. 588; *Todorow* v. *United States,* 173 F. 2d 439, 448 (C.A. 9), certiorari denied, 337 U. S. 925, and the government's brief in opposition to the petition for certiorari in the last-named case, Oct. Term 1948, No. 727, pp. 17-19.

confined, as we show below, pursuant to valid judgments convicting them of contempt. Cf. *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 105.

2. Petitioners attack the validity of the contempt judgments (Pet. 7-8) on the ground that it was the duty of the trial judge to enter the formal judgments and certificates on June 3, 1949, at the time they were placed in custody, and that the court lacked power to enter the judgments five calendar days and three court days later, on June 8. This argument, we submit, is patently without merit.

We know of no rule which requires that when a judge is confronted with a disturbance in his court room he must stay his hand until he has first prepared formal judgments and certificates.[5] On the contrary, it is his first duty to restore order in the judicial proceedings and then to formalize his action by entering a judgment and the certificate required by Rule 42(a). This is what Judge Medina did. He took speedy, firm action to stop the loud, angry shouting in which petitioners were engaged, and then he executed the formal papers required by Rule 42(a). The practice which he followed is that which judges usually follow in making a decision from the bench and later entering a formal order or judgment.

---

[5] Petitioners' assertion that the contempt judgments were an "afterthought" designed to cure what really amounted to revocation of bail is specious. The oral orders of June 3 were precipitated by the disturbance and petitioners' contemptuous remarks and were clearly tantamount to judgments committing them for their contempt.

The fallacy of petitioners' contention is demonstrated by considering what would have happened if Judge Medina had not made the certificates required by Rule 42(a). Undoubtedly, the court below on appeal would have remanded the cases to him for the preparation and entry of such certificates. If a trial court has jurisdiction to correct such a deficiency on remand, it necessarily must have the same jurisdiction to complete the action required of it, prior to the initiation of appellate proceedings.

3. Petitioners also argue (Pet. 8-9) that their sentences to imprisonment for the remainder of the trial are not sufficiently definite. The court below properly rejected this argument.

The test to be applied in determining whether a sentence is sufficiently definite was formulated by this Court in *United States* v. *Daugherty,* 269 U. S. 360, 363: "Sentences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded." Clearly, the date of commencement of petitioners' sentences was definitely fixed. They began on June 3, 1949, when petitioners were committed to the custody of the marshal. In considering whether the terminal date of the sentences is sufficiently definite, it is significant that their termination is governed by an ascertainable event which is certain to occur and which

is not within the power of the court to control so as to effect an increase or decrease of the sentences. The date on which the trial ends is one which the marshal will have no difficulty in knowing and petitioners will easily be able to recognize. Hence, there is no possibility that they will be incarcerated beyond the time intended by the trial judge and specified in the judgments.

As the court below noted (No. 255, R. 212), the sentences involved here are no less definite than those which are imposed in the United States District Court for the District of Columbia under the local indeterminate sentence law. *Sims* v. *Rives,* 84 F. 2d 871 (C.A.D.C.), certiorari denied, 298 U.S. 682; *Farnsworth* v. *Zerbst,* 97 F. 2d 255 (C.A. 5); *Farnsworth* v. *Zerbst,* 98 F. 2d 541 (C.A. 5). Similarly, there is no greater indefiniteness in petitioners' sentences than there is in a case where a defendant is given consecutive sentences. At the time the sentences are imposed, neither the defendant nor his jailer can know with certainty when the first sentence will end and the second begin. Thus, in *Kirk* v. *Squier,* 150 F. 2d 3 (C.A. 9), certiorari denied, 326 U.S. 775, the defendant was sentenced to imprisonment for 37 years, to be served consecutively to a life sentence he was then serving. The life sentence had been imposed by a California court, and under California law the possibility existed that the prisoner would be paroled after serving part of his sentence. The Court of Appeals held that while the defendant was unable to know

the precise date on which his federal sentence would commence, there was an ascertainable event by which that time could be fixed.

Finally, apparently as an appeal *in misericordia,* petitioners argue that their incarceration makes it more difficult for them to consult with counsel in the preparation and conduct of their defense (Pet. 9). The short answer to the argument is that, as Judge Medina's certificates recite (No. 255, R. 117), petitioners and their co-defendants were warned in open court exactly one week prior to the incident in question that the court would tolerate no further obstruction of the administration of justice, and that penalties would be invoked if they refused to pay heed to the court's warning. Thus, the choice was for petitioners. They elected to persist in their contumacious conduct in the teeth of the court's warning, and having so elected they are hardly in a position to complain that their incarceration inconveniences them in consulting with counsel.[6]

CONCLUSION

The facts recited in the trial judge's certificates demonstrate that petitioners were guilty of grossly contemptuous conduct, apparently in an effort to subvert the administration of justice. Petitioners

---

[6] Although the petition (p. 1) prays review of the judgments in the habeas corpus cases, no reason is assigned why those judgments are erroneous. The Court of Appeals was clearly correct in holding (No. 255, R. 209-210) that habeas corpus will not serve as a substitute for the remedy of review by appeal, available to and invoked by petitioners. See, e.g., *Sunal* v. *Large,* 332 U. S. 174.

do not dispute the fact that they are guilty of contempt. The lower courts were clearly correct, and none of the arguments petitioners advance presents any question warranting review. We respectfully submit, therefore, that the petition for writs of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
IRVING S. SHAPIRO,
Attorneys.

SEPTEMBER 1949.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 939736 100